Standards for Exclusion in Immunity Cases after *Kastigar* and *Zicarelli*

I. Introduction

The Supreme Court recently alarmed civil libertarians[1] by diluting the degree of protection that the government must guarantee an individual when it compels him to testify. The Court has long held that the government may require an individual to testify without violating the Fifth Amendment privilege against self-incrimination so long as the witness is assured adequate immunity.[2] Until recently, the minimum necessary protection was thought to be "transactional" immunity, under which the government was entirely barred from prosecuting an individual for any "transaction, matter or thing"[3] as to which he testified. Last term, however, in *Kastigar v. United States*[4] and *Zicarelli v. New Jersey State Commission of Investigation*[5] the Court determined that a less stringent rule—"use-plus-fruits" immunity[6]—is constitutionally sufficient.[7] This standard permits the government to prosecute a witness, but precludes using either the compelled testimony or any information derived therefrom against him at trial.

Kastigar may well have been correctly decided, the libertarians' alarm notwithstanding. But the decision's ultimate effect will depend on the actual content given the use-plus-fruits immunity rule. The fundamental issue is whether an exclusionary rule can be formulated

1. N.Y. Times, May 22, 1972, at 28, col. 4; *id.*, May 24, 1972, at 28, cols. 3-6; *id.*, May 28, 1972, § E, at 6, cols. 4-6.

2. This proposition was first agreed to by a badly split Court in Brown v. Walker, 161 U.S. 591 (1896). It was reaffirmed as recently as 1956 in Ullmann v. United States, 350 U.S. 422, over the dissents of only two Justices.

3. The phrase commonly used in transactional immunity statutes. *See, e.g.*, Immunity Act of 1954, c.769, 68 Stat. 745.

4. 406 U.S. 441 (1972). Petitioners had been found in contempt of court and incarcerated for refusing to testify before a federal grand jury despite a grant of immunity under 18 U.S.C. §§ 6002-03 (1970). The Supreme Court upheld the contempt finding.

5. 406 U.S. 472 (1972). Zicarelli, a reputed major underworld figure, declined to answer certain questions before the New Jersey State Commission of Investigation despite a grant of immunity pursuant to the applicable state law, N.J. STAT. ANN. 52:9M-17(b) (1970). A finding of contempt was upheld by New Jersey's highest court. 55 N.J. 249, 261 A.2d 129 (1970). The Supreme Court affirmed.

6. Use-plus-fruits immunity is also commonly referred to as "testimonial" or "use and derived use" immunity.

7. The Court divided in both cases five-two. Chief Justice Burger and Justices Powell and Blackmun were joined by Justices White and Stewart to form the majority. Justices Douglas and Marshall dissented.

that will fully protect an individual's privilege against self-incrimination. If so, transactional immunity is wastefully broad in sacrificing the possibility of prosecuting known wrongdoers on independent evidence. If not, only a transactional rule will suffice. This Note will contend that an adequate "use-plus-fruits" exclusionary rule can be formulated, and will suggest specific guidelines for such a standard.

II. The Path to *Kastigar* and *Zicarelli*[8]

The Supreme Court first considered an immunity statute in *Counselman v. Hitchcock*,[9] in which it held that the immunity provided was insufficient because the statute only prevented introduction of the compelled testimony in a subsequent prosecution of the witness; protection was not provided against such other uses as employing the privileged testimony to lead to new evidence which might be presented at trial.[10] In its opinion the Court then went on to announce that

> [n]o statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States.[11]

As a result of these words, *Counselman* was generally assumed to have established a transactional immunity rule. In subsequent cases, however, the Court was never squarely presented with the question of whether only transactional immunity is constitutionally sufficient.[12]

In 1964, the Court's decision in *Malloy v. Hogan*,[13] applying the requirements of the Fifth Amendment to the states through the Fourteenth Amendment, indirectly raised new immunity questions. The states would henceforth be required to grant immunity from future prosecution when compelling testimony. It thus became important to

8. For a more detailed review of historical matters see Note, *Witness Immunity Statutes: The Constitutional and Functional Sufficiency of "Use Immunity,"* 51 B.U.L. REV. 616 (1971) [hereinafter cited as Note, *Witness Immunity Statutes*]. *See also* Note, *Immunity Statutes and the Constitution*, 68 COLUM. L. REV. 959 (1968); Note, *Immunity, the Dilemma of Transactional versus Use*, 25 OKLA. L. REV. 109 (1972); Comment, *Immunity From Prosecution: Transactional versus Testimonial or Use*, 17 S. DAK. L. REV. 166 (1972); 24 VAND. L. REV. 815 (1971).

9. 142 U.S. 547 (1892).

10. *Id.* at 564.

11. *Id.* at 585.

12. *See, e.g.*, Smith v. United States, 337 U.S. 137 (1949); Shapiro v. United States, 335 U.S. 1 (1948); United States v. Murdock, 284 U.S. 141 (1931); Heike v. United States, 227 U.S. 131 (1913).

13. 378 U.S. 1 (1964).

determine the effect such an immunity grant would have on future *federal* prosecutions. If the federal government were left free to prosecute on the basis of testimony compelled by the state, the witness's Fifth Amendment rights would become a sham. Yet if transactional immunity were required, and a state's grant of immunity were binding on the federal government, then the state would be able to prevent the federal government from prosecuting for violation of federal statutes, a result that arguably would violate the Supremacy Clause.[14]

The Court resolved the problem with its decision in *Murphy v. Waterfront Commission*,[15] announced the same day as *Malloy*. Justice Goldberg's majority opinion held that a grant of immunity in one jurisdiction is binding on other jurisdictions as well. But it also held that where the prosecuting jurisdiction is different from the one in which the testimony was compelled, use-plus-fruits immunity is sufficient.[16] This approach assured that the witness could not be stripped of his privilege against self-incrimination by being whipsawed between jurisdictions. Yet it also denied the states the effective power to prevent federal prosecution on the basis of independent evidence.[17]

Although *Murphy* clearly settled the inter-jurisdictional case, in the years immediately following the Court seemed uncertain as to the effect of its holding in cases where the questioning and prosecuting jurisdiction were the same.[18] Ultimately, however, the Warren Court

14. Jack v. Kansas, 199 U.S. 372 (1905), indicated that a "state [immunity] statute could not, of course, prevent a prosecution of the same party under the United States statute." *Id.* at 380. *Accord*, Feldman v. United States, 322 U.S. 487 (1944); United States v. Interborough Delicatessen Dealers Ass'n, Inc., 235 F. Supp. 230 (S.D.N.Y. 1964); Cabot v. Corcoran, 332 Mass. 44, 123 N.E.2d 221 (1954). *See also* 8 WIGMORE, EVIDENCE § 2258(2) (McNaughton rev. 1961).

Note that the problem does not exist in the reverse direction. The federal immunity statutes have always been interpreted to bar future state prosecution as well. Reina v. United States, 364 U.S. 507 (1960); Ullmann v. United States, 350 U.S. 422 (1956); Adams v. Maryland, 347 U.S. 179 (1954); Brown v. Walker, 161 U.S. 591 (1896).

15. 378 U.S. 52 (1964).

16. 378 U.S. at 79. Another alternative would have been simply to prevent the states from compelling testimony whenever a federal statute might be involved. Given the broad overlap of state and federal law, however, that approach would have severely hampered the states' ability to investigate.

17. Justice Goldberg's opinion alludes only vaguely to the federalism problem. 378 U.S. at 71, 79. Justice White's concurrence is more explicit in confronting the issue: "[I]f the witness is faced with prosecution by the Federal Government, the State is powerless to extend immunity from prosecution under federal law in order to compel testimony." *Id.* at 97. It has since been generally assumed that the *Murphy* decision was in part a response to the problem of federalism. *See* Kastigar v. United States, 406 U.S. 441, 464 (1972) (Douglas, J., dissenting); Piccirillo v. New York, 400 U.S. 548, 561, 566-67 (1971) (*cert. dismissed as improvidently granted*) (Brennan, J., dissenting).

18. In Albertson v. Subversive Activities Control Board, 382 U.S. 70 (1965), the Court quoted *Counselman's* absolute immunity language with approval although its objection to the statute in question seemed to be only that use was not barred. *Id.* at 80. In Stevens v. Marks, 383 U.S. 234 (1965), Justice Harlan, joined by Justice Stewart, suggested in a concurrence that in light of *Malloy* and *Murphy* the question of the

indicated that it was moving toward full acceptance of a general use-plus-fruits standard.[19] These signs were not lost on Congress. Title II of the Organized Crime Control Act of 1970[20] repealed the existing federal immunity statutes, almost all transactional, and substituted a uniform use-plus-fruits rule.[21] It was this Act that forced the Court's hand and whose constitutionality was upheld in *Kastigar*.

Much of Justice Powell's majority opinion in *Kastigar* is devoted to the argument that prior decisions in the immunity area provide precedent for the constitutionality of a general use-plus-fruits standard.[22] As the discussion above suggests, this position has some justification, but it is hardly inescapable.[23] Prior decisions simply never addressed the issue directly.

required intra-jurisdictional immunity should be fully briefed and argued. *Id.* at 249.

The lower courts and commentators were equally confused. *Compare* United States *ex rel.* Catena v. Elias, 449 F.2d 40, 42-44 (3d Cir. 1971); *In re* Korman, 449 F.2d 32, 37-38 (7th Cir. 1971); *In re* Kinoy, 326 F. Supp. 407, 412 (S.D.N.Y. 1971); Note, *Counselman, Malloy, Murphy and the State's Power to Grant Immunity*, 20 RUTGERS L. REV. 336, 343 (1966); Note, *Federalism and the Fifth: Configurations of Grants of Immunity*, 12 U.C.L.A. L. REV. 561, 577-78 (1965); *with* Stewart v. United States, 440 F.2d 954, 956-57 (9th Cir. 1971), *aff'd sub nom.* Kastigar v. United States, 406 U.S. 441 (1972); Zicarelli v. New Jersey State Comm'n of Investigation, 55 N.J. 249, 261 A.2d 129 (1970), *aff'd*, 406 U.S. 472 (1972); Note, *Witness Immunity Statutes*, *supra* note 8, at 632.

19. For example, in Gardner v. Broderick, 392 U.S. 273 (1968), Justice Fortas, in dictum in the course of the majority opinion, stated his full acceptance of use-plus-fruits immunity in intra-jurisdictional cases. *Id.* at 276. In the same year, in Marchetti v. United States, 390 U.S. 39 (1968), Chief Justice Warren, writing for the Court, found the government's argument for an implied use-plus-fruits restriction to a federal registration statute "in principle an attractive and apparently practical" solution, *id.* at 58, although he ultimately rejected it on other grounds.

A full-scale attempt to justify a continued requirement for transactional immunity intra-jurisdictionally was made by Justice Brennan in his dissent in Piccirillo v. New York, 400 U.S. 548, 552 (1971) (*cert. dismissed as improvidently granted*). His chief concern was that a much greater threat of unauthorized, untraceable transfers of information between investigator and prosecutor is inevitable where only a single government is involved. But the basis of Justice Brennan's position, that the danger is sufficiently greater within a single jurisdiction to require a stricter constitutional standard, is open to doubt. Today, joint operations of law enforcement agencies regularly cut across county and state lines. *See generally* THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE ch. 4 (1967). A recent example of inter-jurisdictional cooperation is the series of coordinated drug raids carried out by police in the metropolitan New York area supervised by the multi-state Regional Narcotics Task Force. For the details of one such series of raids see N.Y. Times, May 25, 1972, at 1, col. 1. As these multi-governmental operations become commonplace, the same dangers of undisclosed transfers are present in the inter-jurisdictional case as well. As a result, there must be adequate protection for the individual prosecuted by a governmental unit different from the one which questioned him.

20. 18 U.S.C. §§ 6001-05 (1970).

21. The new statute reads in part:

> [N]o testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case . . . .

18 U.S.C. § 6002 (1970).

22. 406 U.S. 441, 448-59 (1972). The opinion stresses particularly that the logic of *Counselman* requires only the barring of compelled testimony and its fruits. The statement in that case suggesting transactional immunity is dismissed as unnecessary dictum.

23. Justice Douglas' dissent is devoted in large part to criticism of Justice Powell's reading of the precedents. *Id.* at 462-67.

Unfortunately, Justice Powell adds little discussion of his own concerning the competing merits of a transactional and a testimonial rule. In particular, he fails to suggest the specific content of an exclusionary rule implementing use-plus-fruits immunity which will guarantee protection of the individual's Fifth Amendment privilege.[24]

III. Existing Exclusionary Rules

A. *The Analogy to Coerced Confessions*

The starting point in formulating an exclusionary rule for use-plus-fruits immunity is the majority opinion in *Murphy v. Waterfront Commission*. In an important footnote, the Court places the burden on the government to prove "an independent, legitimate source"[25] for its evidence in prosecuting a person previously compelled to testify in exchange for immunity. The majority opinion in *Kastigar* reaffirms *Murphy* on this issue.[26] Yet neither *Murphy* nor *Kastigar* provides standards that the government must meet in sustaining its burden.

The *Kastigar* opinion draws an analogy to the use of an exclusionary rule in coerced confession cases, also involving the privilege against self-incrimination,[27] in support of its holding that an exclusionary rule is adequate when immunity is granted.[28] In the absence of any other discussion of appropriate standards, the opinion's reliance on this analogy suggests that the same exclusionary rule presently applied in coerced confession cases should be extended to situations where testimony has been compelled under immunity.[29] Closer consideration, however, indicates that the existing coerced confession exclusionary rule would be inadequate in the immunity area for two reasons: first, because that rule is presently too weak even for coerced confession cases, and second, because any rule appropriate for coerced confessions would still be insufficient in immunity grant cases as a result of important differences in the circumstances involved.

24. *See id.* at 460-62.
25. 378 U.S. 52, 79 n.18 (1964).
26. 406 U.S. 441, 460 (1972).
27. Davis v. North Carolina, 384 U.S. 737, 740 (1966); Malloy v. Hogan, 378 U.S. 1, 7 (1964); Bram v. United States, 168 U.S. 532, 542 (1897).
28. 406 U.S. at 461-62.
29. In fact, Justice Powell's brief discussion of the issue gives some indication that if the rules diverge at all a stricter standard may be required for coerced confessions, since he asserts that

> Moreover a defendant against whom incriminating evidence has been obtained through a grant of immunity may be in a stronger position at trial than a defendant who asserts a Fifth Amendment coerced-confession claim.

Id. at 461.

B. *The Relevance of the Fourth Amendment*

It has long been established that a coerced confession cannot be introduced in evidence against the individual who gave it.[30] But only recently, in *Harrison v. United States,*[31] has the Court explicitly held that additional evidence or information derived from a coerced confession—that is, the "fruits"—must also be excluded. In applying this holding to the facts in *Harrison,* the Court adopted the language it had frequently used before to characterize the exclusionary rule applied in Fourth Amendment search and seizure cases.[32] As a result, it appears that the latter rule has been transplanted intact to coerced confession cases as well.

The Fourth Amendment rule, however, is inadequate to meet the requirements of the Fifth Amendment. In practice, the *Harrison* wording permits the fruits of coerced confessions, in diverse forms, to be introduced at trial. It thus fails to provide sufficient protection against such derivative uses.[33]

By equating the rules to be applied in the two cases, the Court in *Harrison* appears to ignore critical distinctions between the Fourth and Fifth Amendments—distinctions which it has clearly recognized in previous opinions. The Fourth Amendment is aimed primarily at protection of privacy.[34] Exclusion of evidence obtained through an

30. No matter what standard the Court has adopted for determining whether a confession is valid, the penalty for violating its existing rule has been exclusion of the confession and its fruits, not a bar on subsequent prosecution. Jackson v. Denno, 378 U.S. 368, 394 (1964). Thus, exclusion was required in Brown v. Mississippi, 297 U.S. 278 (1936), where actual torture had taken place, just as it was in Miranda v. Arizona, 384 U.S. 436 (1966), where a man was interrogated without being informed of his constitutional rights. *See also* Spano v. New York, 360 U.S. 315 (1959); Watts v. Indiana, 338 U.S. 49 (1949); Chambers v. Florida, 309 U.S. 227 (1940); Wan v. United States, 266 U.S. 1 (1924); Hopt v. Utah, 110 U.S. 574 (1884).

31. 392 U.S. 219 (1968). The question in the case was whether petitioner's testimony in a previous trial, given after confessions later determined to have been coerced were admitted, was "the inadmissible fruit of the illegally procured confessions." *Id.* at 221.

32. The Court used the Fourth Amendment rule as expressed in Wong Sun v. United States, 371 U.S. 471 (1963), in finding that the petitioner's testimony had not been shown to have been "obtained 'by means sufficiently distinguishable' from the underlying illegalities 'to be purged of the primary taint'." 392 U.S. at 226, *quoting* Wong Sun v. United States, *supra* at 488.

33. Another distressing feature of the coerced confession rule as presently developed is its willingness to allow, at least in some circumstances, the use of an illegally obtained confession in a subsequent prosecution to impeach the testimony of the individual from whom it was received. Harris v. New York, 401 U.S. 222 (1971). Dershowitz & Ely, *Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority,* 80 YALE L.J. 1198 (1971), worriedly suggests that it is a short step from this position to holding that testimony obtained under immunity may be similarly used for impeachment in a subsequent prosecution. *Id.* at 1223.

34. "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. CONST. amend. IV.

illegal search cannot remedy the constitutional violation.[35] Rather, the object of an exclusionary rule in such cases is to deter future police misconduct "by removing the incentive to disregard"[36] the constitutional guarantee.[37] Hence, the Court has reasoned that exclusion of evidence makes sense only if the link between the evidence and the illegal act is concrete enough so that the police can appreciate the disadvantage to which their conduct put the government in prosecuting the victim.[38]

In contrast, the primary purpose of the Fifth Amendment privilege is to avoid forcing an individual to contribute to the imposition of criminal penalties upon himself,[39] not to protect his privacy.[40] Com-

35. Thus presumably, unlike the Fifth Amendment case, the legislature could not authorize the police to search persons' homes without probable cause even if such searches were accompanied by a broad grant of immunity.

36. Elkins v. United States, 364 U.S. 206, 217 (1960). In Tehan v. United States *ex rel.* Shott, 382 U.S. 406 (1966), the Court asserted even more emphatically that the "single and distinct 'purpose'" of the Fourth Amendment exclusionary rule is to deter future unconstitutional police conduct. *Id.* at 413. *But see* note 37 *infra*.

37. While the Court held in Mapp v. Ohio, 367 U.S. 643 (1961), that the exclusionary rule for the Fourth Amendment is constitutionally required, *id.* at 655, it is unclear whether that result was reached because the exclusionary rule is the only effective way to deter violation of the rights involved, *see id.* at 656, or because illegally seized evidence is unconstitutional of itself, *see id.* at 655-56. Arguably Linkletter v. Walker, 381 U.S. 618 (1965), by refusing to apply *Mapp* retroactively, resolved that the former view is correct. *See The Supreme Court, 1967 Term*, 82 HARV. L. REV. 63, 218 n.19 (1968). If that is the case, then it might be possible to replace the exclusionary rule, if more effective means were found to deter police conduct, and authorize admission of evidence seized in illegal searches. In the Fifth Amendment context, in contrast, an attempt to authorize the admission of tainted evidence in a prosecution of the person from whom it was obtained would clearly be unconstitutional under any conditions. *See* note 39 *infra*.

38. Thus, evidence may be introduced if its connection with the privileged evidence has "become so attenuated as to dissipate the taint." Wong Sun v. United States, 371 U.S. 471, 491 (1963); Nardone v. United States, 308 U.S. 338, 341 (1939); *see also* Harrison v. United States, 392 U.S. 219, 231 (1968) (White, J., dissenting); Linkletter v. Walker, 381 U.S. 618, 636-37 (1965); *The Supreme Court, 1967 Term*, 82 HARV. L. REV. 63, 221-22 (1968). This "attenuation doctrine" has occasionally been the subject of severe criticism. *See, e.g.*, Note, *Developments in the Law—Confessions*, 79 HARV. L. REV. 935, 1024-25 (1966).

39. "The design of the constitutional privilege is not to aid the witness in vindicating his character, but to protect him against being compelled to furnish evidence to convict him of a criminal charge." Brown v. Walker, 161 U.S. 591, 605-06 (1896). This proposition was reaffirmed in Ullmann v. United States, 350 U.S. 422 (1956), where the Court stated that "the sole concern" of the privilege is "the danger to a witness forced to give testimony leading to the infliction of 'penalties affixed to criminal statutes' . . . ." *Id.* at 438, *quoting* Boyd v. United States, 116 U.S. 616, 634 (1886). The two dissenters, Justices Black and Douglas, took a much broader view of what the Fifth Amendment protected than did the majority. They argued that immunity could not protect an individual's conscience, dignity, and freedom of expression, or prevent him from being subject to infamy and disgrace. *Id.* at 440 (Douglas, J., dissenting). By 1972, only Justice Douglas still contended that "the framers put it beyond the power of Congress to *compel* anyone to confess his crimes." Kastigar v. United States, 406 U.S. 441, 467 (Douglas, J., dissenting) (emphasis in original). *See also* Kastigar v. United States, 406 U.S. 441, 453; *The Supreme Court, 1967 Term*, 82 HARV. L. REV. 63, 222 (1968); Note, *Immunity Statutes and the Constitution*, 68 COLUM. L. REV. 959, 964 (1968).

40. The Fourth and Fifth Amendments do overlap to some extent. The complex of values from which the Fifth Amendment arose included considerations of privacy. Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964). Similarly, the Fourth Amend-

pelling an individual to give information against his will, even if that information is self-incriminating, is not a constitutional violation per se. If the rule were otherwise, *no* immunity statute would be constitutional.[41] Rather, the Fifth Amendment simply requires that, *if* testimony is compelled, the witness must be secure from the possibility that he will be confronted at trial with information obtained as a result. Thus, unlike the Fourth Amendment, the Fifth Amendment is directly concerned with the introduction of tainted evidence at trial; it is in fact the introduction of such evidence that constitutes the primary violation of the Amendment. Even if the exclusion of evidence derived from a coerced confession is unlikely to have a deterrent effect on the police, its introduction will still represent an infringement on the individual's privilege against self-incrimination.[42]

C. *Coerced Confessions Compared to Immunity Grants*

As the preceding section shows, an exclusionary rule developed for Fourth Amendment cases does not provide protection sufficient to accomplish the purpose of the Fifth Amendment. Even if a rule appropriate for coerced confessions were adopted,[43] however, it would still be inadequate for immunity grants.

As Justice Marshall points out in his dissent in *Kastigar*,[44] some important distinctions can be drawn between the circumstances surrounding coerced confessions and those surrounding the compulsion

ment violation of privacy is compounded when privileged evidence is introduced in open court. As the Court noted in Mapp v. Ohio, 367 U.S. 643 (1961), "the Fourth and Fifth Amendments . . . enjoy an 'intimate relation' in their perpetuation of 'principles of humanity and civil liberty' . . . ." *Id.* at 657 (footnotes omitted). But in each case, as the language of the Amendments themselves and the cases discussed above indicate, *see* notes 34-39 *supra*, a separate primary purpose stands out.

41. *See* note 2 *supra*.

42. Thus, the attenuation doctrine is inappropriate in Fifth Amendment cases. *See* Pitler, *"Fruit of the Poisonous Tree" Revisited and Shepardized*, 56 CALIF. L. REV. 579 620 (1968); Note, *Developments in the Law—Confessions*, 79 HARV. L. REV. 935, 1028 n.21 (1966).

That some confusion on this issue still exists is evidenced by Justice White's dissent in Harrison v. United States, 392 U.S. 219, 228 (1968):

> When one deals with the fruits of an illegal search or seizure, as in *Silverthorne*, or with the fruits of an illegal confession, as the Court decides that we do in this case, the reason for suppression of the original illegal evidence itself is prophylactic—to deter the police from engaging in such conduct in the future by denying them its past benefits.

Id. at 231 (footnote omitted). *See also* Lego v. Twomey, 404 U.S. 477, 488-89 (1970).

43. Perhaps because in both the search and seizure and coerced confession cases the initial factor is police misconduct, the distinctions between the two situations have generally been neglected. Now that the immunity grant issue has forced attention to focus on the special considerations applicable to exclusionary rules in the Fifth Amendment context, however, it is to be hoped that the courts will turn their attention as well to the need for a better-developed rule for coerced confessions.

44. Kastigar v. United States, 406 U.S. 441, 467 (1972) (Marshall, J., dissenting).

of testimony under a grant of immunity. In the coerced confession case, the evidentiary rule is applied after the interrogation has occurred, not before as with a grant of immunity. Furthermore, the decision to interrogate is made by a policeman who is without substantial legal training, and who is often acting in haste and under pressure. When testimony is compelled under a grant of immunity, in contrast, the entire proceeding is in the hands of a prosecutor who is a lawyer, and who has ample time to consider the appropriate course of action. Finally, while there can be no mistaking the act of granting immunity, it is not always clear what constitutes a coerced confession. The Supreme Court has periodically revised its definitions in this area, often relying on subtle distinctions which, even if known by a policeman, may be difficult for him to apply in any given case. These considerations are important in formulating an appropriate exclusionary rule for each situation.

A rule which seeks to protect individual rights must be drawn with an awareness of its cost to society as well as its effectiveness in protecting the personal privilege. The goal should be to frame a standard which maximizes the latter while minimizing the former. Where these dual objectives necessarily conflict, a proper balance between them must be sought.[45] The question is: Should the rule employed to achieve the preferred social balance be different for coerced confessions than for immunity grants?

Degree of Protection. Any given rule, whether exclusionary or transactional, will provide roughly equivalent protection for the individual's privilege when applied to the two types of cases. The Fifth Amendment simply requires that an individual not be confronted at trial with evidence derived from privileged information. Whether that information was obtained by coercing a confession or by compelling testimony will have little effect on the protection a rule affords against its use.[46]

45. Such balancing, rather than an absolutist approach, has always been characteristic of the Court's decisions in the Fifth Amendment area. *Any* prosecution after a confession has been coerced or testimony has been compelled, whether that prosecution is for a matter directly covered by the interrogation or not, involves some danger that tainted evidence will be introduced. The Court, however, has never suggested that a person must be free from all future prosecution whatsoever after such interrogation has taken place. Rather, in the immunity area, at most it has barred subsequent prosecution for the same transaction, *see* p. 171 *supra*, and in the coerced confession area has simply employed a relatively weak exclusionary rule, see p. 176 *supra*.

46. Distinguishing between the Fourth and Fifth Amendments is essential here. If the prevention of illegal police conduct in coercing confessions were the primary concern of the Fifth Amendment, then the effectiveness of a rule as a deterrent would be an appropriate consideration. In that context, it would be relevant whether the rule were to be applied before or after the event, whether the decision to obtain informa-

Cost to Society. On the other hand, the cost to society exacted by a given rule will be considerably higher when applied to coerced confessions than when employed in the immunity grant case, since such costs are likely to be much lower when the rule is applied to a prosecutor than when enforced against a policeman. The prosecutor is in a good position to determine the possible costs. Presumably, he will grant immunity only when he is sure the information is worth more to society than the reduced chance of the witness's conviction. In addition, a prosecutor can be expected to take all steps necessary prior to granting immunity to insure that the cost is at a minimum. For example, he may compel only specifically required information in order to keep the resulting exclusion or immunity as narrow as possible. A policeman, on the other hand, is less likely to realize the impact of his actions on the government's case in a subsequent trial, and is therefore not in as good a position to consider whether an individual's information is worth more to society than his conviction.[47] He is less likely to take steps before and during coercion of a confession to minimize its cost.[48]

In sum, any given rule, applied to both confessions and immunity grants, will provide roughly the same degree of protection for the individual's privilege but will exact higher societal costs in the coerced

tion would generally be made in haste and under difficult circumstances, and whether the individuals who would usually be making the decisions were trained in the law. Instead, however, a Fifth Amendment rule is appropriately judged by its success in insuring that privileged information is not used against an individual at trial. None of these distinctions affects the ability of a given transactional or testimonial rule to accomplish that goal.

It should also be noted that even if deterrence were a factor, a more stringent rule still would be appropriate in the immunity case as compared to the confession case. The differences pointed out above suggest that a policeman is much less likely to be deterred by a strict rule than a prosecutor, whether because of lack of training or of time for adequate consideration. It is also possible that he simply will not care that the prosecution will be put at a disadvantage at trial as long as he has the satisfaction of solving the case by obtaining a confession and of applying his own informal sanctions. *See* Allen, *Federalism and the Fourth Amendment: A Requiem for* Wolf, 1961 SUP. CT. REV. 1, 39.

47. The significance of these factors, however, should not be overestimated. The state has the opportunity to select and train its policemen to ensure that they know when their actions are unauthorized. It is also capable of providing substantial deterrence to prevent the police from performing illegal acts. Thus, the state may be able to minimize or avoid costs in the coerced confession case as well. In fact, too great a difference between the standard for coerced confessions and that for immunity grants might actually encourage the authorities to employ illegal means of obtaining privileged information rather than legal ones because of the lesser costs involved.

48. A similar argument focuses on more symbolic considerations. The legislature, more than any other institution, is the embodiment of the society. Where the legislature has authorized compulsion of testimony despite the privilege against self-incrimination, the decision is properly viewed as one made by the society, the full cost of which it should bear. A local policeman who coerces a confession, on the other hand, is probably acting contrary to established rules. It is much less clear that society as a whole should be held as strictly accountable for this sort of unauthorized action by one of its lower level officials.

confession case. Thus, in order to strike the same preferred social balance, a stricter rule is necessary when testimony is compelled under immunity. This analysis, however, can only determine the *comparative* strictness appropriate for rules dealing with the two situations. The specific content of the immunity rule is the next subject of inquiry.

IV. A Proposed Exclusionary Rule

A. *Objective Standards*

A witness who has been compelled to testify is at a distinct disadvantage in a subsequent prosecution, regardless of the burden of proof on the government. As Judge Motley observed in her opinion in *In re Kinoy*:[49]

> To say a witness can successfully rebut the Government's proof that its source is untainted is to be naive about the imbalance which daily attends the resources of Government as opposed to those of an average defendant in a criminal case.[50]

The prosecution is likely to have exclusive knowledge of the original sources of its evidence.[51] While discovery may be of some assistance, particularly under a liberal provision like Federal Rule 16,[52] no defendant will be allowed the unrestricted access to the prosecutor's files necessary to be sure that the independent source claimed is legitimate.[53] No one, moreover, can accurately estimate the subjective effect of knowledge of the witness's guilt on the investigators' zeal in pursuing new evidence. And a prosecutor may not even be aware of an unauthorized use of privileged information by an employee "in the depths of his investigative process."[54]

What is needed is a set of adequate objective standards which must be met by the government before a court will accept evidence as untainted in a subsequent prosecution. A subjective formulation of the *Murphy* burden of proof standard—whether "preponderance of the evidence," "clear and convincing," or "beyond a reasonable doubt"—

49. 326 F. Supp. 407 (S.D.N.Y. 1971).
50. *Id.* at 419.
51. *See* Kastigar v. United States, 406 U.S. 441, 469 (Marshall, J., dissenting). *See also* Note, *Witness Immunity Statutes*, *supra* note 8, at 659; Note, *In re Koota: The Scope of Immunity Statutes*, 61 NW. U.L. REV. 654, 663-66 (1966).
52. FED. R. CRIM. P. 16.
53. *See* Note, *Witness Immunity Statutes*, *supra* note 8, at 659.
54. Kastigar v. United States, 406 U.S. 441, 469 (1972) (Marshall, J., dissenting).

will not alone provide a "reliable guarantee"[55] of a witness's privilege. The following standards are proposed to comprise an exclusionary rule insuring that the government bears its burden in establishing an "independent, legitimate source."[56]

1. *In prosecuting an individual for a matter concerning which he has previously been compelled to testify under a grant of immunity, the government will be confined to evidence which was certified by the court before the testimony was compelled.* Under this standard, if a prosecutor wishes to maintain the possibility of a future indictment of a witness for a matter as to which he will be testifying, all evidence that he has in hand before the grant of immunity must be reduced to certifiable form. This procedure would involve a detailed affidavit by the prosecutor as to the offenses charged and the evidence he presently holds, together with documents to support his claims. Included would be depositions or affidavits of all witnesses, photographs of items of physical evidence, and copies of all records and medical or laboratory reports.[57] The complete report would be filed with the court from which the immunity grant was requested as part of the petitioning procedure.[58] Although the report would be held in strict confidence, the court could require a closed hearing to clarify any uncertainties in the report as to what evidence the government actually holds. In a subsequent trial, the prosecution would be limited to evidence certified in the filed report.[59] If the prosecutor did not file such a report, all evidence presented by the government in a later prosecution for a matter touched upon by the witness's testimony would irrebutedly be presumed tainted and thus be inadmissible.

2. *Before granting immunity to a witness, a prosecutor must notify other jurisdictions that might wish to prosecute the individual for*

55. *Id.* at 468-69.

56. Murphy v. Waterfront Comm'n, 378 U.S. 52, 79 n.18 (1964).

57. These procedures, if not applied reasonably, could obviously put an intolerable burden on prosecutors. For example, a full deposition of every potential witness before granting immunity would probably be impossible given the government's limited resources in terms of time and personnel. At a minimum, however, a detailed affidavit from the witnesses would be necessary. In general, the courts would be relied upon to exercise good judgment in developing certification procedures consistent with protection of a witness's rights.

58. The present federal immunity statute requires that the United States attorney for a district, after obtaining approval from the Attorney General, must request that the district court grant immunity for a witness when he judges it to be warranted. 18 U.S.C. § 6003 (1970). For a discussion of special cases involving congressional committees and federal agencies see note 62 *infra*.

59. Close questions would necessarily arise as to whether answers sought or evidence presented were included in the certified report. A strict burden of proof should be placed on the government to demonstrate that the evidence it presents was actually certified. Such a presumption against the state would guarantee that, if a prosecutor desired to keep open the option of prosecuting, he would be careful during certification.

related matters and, upon their request, provide them with the opportunity to reduce their evidence to certifiable form. Whether later indictment were contemplated or not, the prosecutor would be required to check with the National Crime Information Center[60] for information on the individual, including outstanding warrants. On the basis of the reply from the NCIC and other available facts, including biographical information, the questioning authorities would have to notify any other jurisdiction that might be interested in the individual of its intention to grant immunity. A minimum waiting period after notification had been sent (perhaps two weeks) would be mandatory before immunity could be granted. If any other jurisdiction indicated that it intended to prosecute the witness, consideration would have to be given to its interests. At a minimum the questioning jurisdiction would have to allow time for other prosecutors to reduce their evidence to certifiable form.[61] Only after this notification procedure was satisfactorily completed would a court grant immunity.[62]

3. *In a subsequent prosecution of a witness for matters as to which he has testified, jurisdictions other than that which originally granted immunity will also be barred from introducing evidence not certified prior to the witness's testimony.* As standard 2 implies, other jurisdictions would be held to the same evidentiary restrictions as the questioning sovereign in any subsequent prosecution of the witness for

60. The National Crime Information Center (NCIC) is a central crime data storage system operated by the Federal Bureau of Investigation with inputs from law enforcement agencies throughout the country. Along with information on stolen vehicles, guns and other articles with identification numbers, it holds names of persons wanted for felony offenses. The relevant criteria for these wanted listings are that judicial process must be outstanding and the state or city must be willing to seek the extradition of the individual in order to prosecute him. As of July 1, 1972, 114,306 wanted individuals were listed. In addition, 162,290 computerized criminal histories were contained in the bank. These records for previous offenders are accompanied by court disposition sheets for each charge recorded against them.

This information is readily available to police departments throughout the country. There is at least one major link with the system in each state. Local departments in turn are connected to the state authority in contact wih NCIC. Local officials thus are able to obtain information from NCIC within a few seconds. Ready access to the system is indicated by its heavy use: in June 1972, the network handled 2,722,869 separate requests. Conversation with Agent John Rikes, San Francisco Office, Federal Bureau of Investigation, in San Francisco, Aug. 24, 1972.

61. More drastic steps might include establishing a priority schedule among crimes. Any jurisdiction which sought to grant a witness immunity with respect to certain matters might be barred from doing so if another jurisdiction indicated that it intended to prosecute for a "more serious" violation. Such matters of priority, however, seem better left to the discretion of the authorities involved in each particular case.

62. The notification procedure has some inherent limitations. Such factors as use of new aliases, failure or delay in filing warrants with NCIC, and the absence of a warrant in a case where investigation is still proceeding, mean that the information obtained from NCIC will necessarily be of limited usefulness. Offsetting these drawbacks, however, is the probability that the authorities seeking the compelled testimony will usually know which other jurisdictions might be interested in him as a result of their own investigation of the witness.

matters as to which he had testified. The only difference would be that the prosecutor's report would be filed with the court in which he expected to try his case rather than with the one granting immunity. This standard would bind a jurisdiction whether in fact it had been informed in advance of the immunity grant or not.

These standards, if adopted by the Court,[63] would answer most of the objections of the critics of use-plus-fruits immunity. An independent source[64] would be objectively verifiable. The defendant would not need to rely on the prosecutor's good faith, nor depend on a necessarily subjective judgment as to whether any of the investigatory personnel used or were influenced by the privileged testimony.[65] The prosecutor would be limited to presenting evidence that he held before the defendant was compelled to say a word.

These standards may at first seem overly harsh. They would preclude the possibility of the prosecution continuing its investigation and obtaining legitimately independent evidence. Such new evidence, though untainted, would be barred at trial. Yet prior completion is the only fully reliable method of determining that evidence was obtained independently of the privileged testimony. Otherwise, that

63. The procedure suggested may seem too detailed to be announced in a Supreme Court opinion. Such a step by the Court, however, is not without precedent. For example, the Court recently announced six quite specific "minimum requirements of due process" for a parole revocation hearing. Morrissey v. Brewer, 92 S. Ct. 2593, 2604 (1972). The standards established there are at least as detailed as those proposed here.

Standards 1, 3 and 4 could be made fully effective against both state and federal governments by a Supreme Court decision. They would be mandated as the minimal constitutional requirements necessary to protect the Fifth Amendment privilege at trials of individuals previously compelled to testify.

Standard 2, in contrast, is generally aimed not at protection of a constitutional right but rather at the efficient administration of the criminal justice system. The notification requirement has a constitutional justification in only one instance: States will be required to notify the U.S. Attorney General of their decision to grant immunity; otherwise the federalism problem which *Murphy* avoided would reappear. *See* p. 173 *supra*. Aside from this one exception, the Court's ability to require notification depends on its authority to impose administrative rules. *See* Elkins v. United States, 364 U.S. 206, 216 (1960); McNabb v. United States, 318 U.S. 332, 341 (1943). Thus, wherever approval of a federal judge is required for an immunity grant, mandatory notification of other jurisdictions could be enforced. Under the present federal immunity statute, therefore, the second standard could be imposed on United States attorneys and the Congress, since both of them must petition for and receive an immunity grant from a federal district judge for a witness compelled to testify. 18 U.S.C. §§ 6003, 6005 (1970). Federal agencies, however, are now required to obtain only the approval of the Attorney General to compel testimony under an immunity grant, 18 U.S.C. § 6004 (1970), and thus would not be affected by an administrative rule announced by the Court. Imposition of the notification requirement on them would require alteration of the present law by Congress.

At the state level, the Court also would be unable to impose its standard, beyond requiring notification of the Attorney General. Reciprocal agreements by the states, however, to provide such notification among themselves would be likely.

64. The concern of Justices Brennan, Piccirillo v. New York, 400 U.S. 548, 568 (1970) (*cert. dismissed as improvidently granted*) (Brennan, J., dissenting), Marshall, Kastigar v. United States, 406 U.S. 441, 468 (1972) (Marshall, J., dissenting), and Douglas, *id.* at 467 n.2 (Douglas, J., dissenting), as well as Judge Motley, *In re* Kinoy, 326 F. Supp. 407, 418 (S.D.N.Y. 1971).

65. *Cf.* Kastigar v. United States, 406 U.S. 441, 469 (1972) (Marshall, J., dissenting).

distinction frequently would be impossible to make because of the subjective factors discussed above.[66]

The inconvenience to the prosecution of completing its investigation before trial would not be unreasonable. The government obtains distinct advantages from the information given under immunity as, for example, when it wishes to make a solid case against other figures involved in a crime, or to procure legislation. Ultimately, the specific standards proposed might be of significant use to the government in prosecuting witnesses who have previously been compelled to testify. Without the standards, such prosecution would be virtually impossible where the courts gave real meaning to the government's burden to prove that it has used only independent evidence.[67] With the standards, the prosecutor has specific guidelines he may follow to convince any court that his evidence is untainted.

The standards proposed here do not, however, go so far as to require that the witness be tried, if at all, before immunity is granted. While such a requirement might seem to follow logically from the concept of protection by prior completion, offsetting time pressures must also be considered. The information obtained by compelled testimony is often essential to proceed in actions against other persons. To require prior trial of the witness might entail significant delays, particularly where more than one jurisdiction wished to prosecute. The result in some cases could be unreasonably long periods of pretrial detention for persons against whom the witness's testimony was to be used. It would also be impossible to obtain quickly the privileged information necessary for immediate moves in a fast developing situation without eliminating the possibility of future prosecution of the witness. Such a restriction seems unnecessary where the government already holds evidence sufficient for the conviction of the witness which it can easily place in certifiable form.

Yet one important problem remains: the possibility that the prosecutor may have access to the compelled testimony and use it in some significant way short of introducing tainted evidence in a subsequent trial. Such uses might include assistance in planning trial strategy, interpreting the meaning of evidence, or planning cross-examination if the defendant takes the stand.[68] One last requirement, therefore, is proposed.

66. *See* p. 181 *supra*.
67. Note, *Witness Immunity Statutes*, *supra* note 8, at 664.
68. Concern with investigative or prosecutorial use resulting from access to a transcript of privileged statements has been the basis of the decision in one recent case and of a concurrence in another. In United States v. McDaniel, 449 F.2d 832 (8th Cir. 1971), the court reversed federal convictions for embezzlement, misappropriation of funds and

4. *The prosecutor in a trial of a witness who has previously testified under a grant of immunity must swear that he has not had access to the privileged testimony or to any information derived from it.* Before beginning the trial of an individual previously compelled to testify, the prosecutor would be required to swear that he had neither seen a transcript of the privileged testimony nor been informed in any way of its contents or of any information derived from it. Where circumstances precluded the possibility of total ignorance, the trial judge on his own motion could disqualify the prosecutor without applying the oath. Examples of such cases would include situations where the privileged testimony had been given media coverage or where cases involving evidence derived from the testimony of the accused had been handled by the same office.

Even with this last rule, however, protection for the individual would not be absolute. Many problems are of course involved in relying on oaths of law enforcement officials.[69] One very real drawback is the encouragement given to lying. Yet the oath involved here would be limited in scope, and would often be subject to objective verification. In some cases, as where a transcript had been formally obtained, the truth could be easily determined. In most cases at least one other person, the individual who supplied the information, would know the facts. Given the small potential for obtaining advantage from the in-

making false entries in the records of a federally insured bank because the United States attorney for the district had requested and received a transcript of the defendant's testimony under an immunity grant before a state grand jury. The court held that this conduct constituted a prima facie use of the privileged testimony. *Id.* at 837. Similarly Chief Judge Seitz, in his concurrence in United States *ex rel.* Catena v. Elias, 449 F.2d 40, 45 (3d Cir. 1971), expressed his concern that the prosecutor would use privileged testimony given under immunity to formulate his questions on cross-examination if the defendant elected to take the stand.

At least one commentator has argued that this type of use need not be prevented. *See* Note, *Witness Immunity Statutes*, *supra* note 8, at 647-48. Drawing an analogy with the Fourth Amendment case where the prosecutor is aware that the evidence suppressed at trial was illegally obtained, the author argues that no broader remedy is required in the Fifth Amendment area. But this position fails to take account of the distinctions between the Fourth and Fifth Amendments discussed at pp. 176-78 *supra*.

69. Broader use of prosecutors' oaths in this area has been suggested. One commentator proposes that a prosecutor's oath is the solution to the whole problem of insuring independent evidence. Note, *In re Koota: The Scope of Immunity Statutes*, 61 Nw. U.L. Rev. 654, 655 (1966). Another calls for oaths by key investigatory personnel, presumably including the prosecutor, as one of a series of procedures to avoid subsequent prosecutions that violate the privilege against self-incrimination. *See* Note, *Witness Immunity Statutes*, *supra* note 8, at 662. There are, however, numerous problems with relying on oaths. Among these are: the possibility that a law enforcement officer might be unaware that he had informally received privileged information or that such information had been used by his subordinates; the difficulty of determining how much an individual was affected in his investigation by the certainty of guilt; and the problem of enforcement when investigation of a perjury charge will be conducted by fellow officers within the same jurisdiction. *Id.*

formation[70] and the very high cost if caught,[71] most prosecutors would not risk using tainted information. To be sure, an oath cannot preclude the prosecutor from receiving information whose taint is unknown to him. But in such a case the potential harm to the defendant would be relatively small. The information transferred could not be very extensive or significant if the prosecutor remained unaware of its source. Furthermore, any tainted evidence so obtained could be put only to limited use. Since it would not be certified before the immunity grant, it could not be introduced at trial.

Even the transactional rule, supposedly absolute in its protection, subjects a person to a similar threat to his privilege against self-incrimination.[72] A witness's compelled testimony may ultimately contribute to his conviction for a crime other than the ones covered by the immunity grant. Once attention and investigation are focused on a person's activities, other possible violations are more likely to come to light. In fact, the so-called transactional standard is in effect only a particularly strict form of exclusionary rule which regards all evidence as tainted in any subsequent prosecution for matters covered in the compelled testimony. It does not provide complete protection against introduction of the tainted fruits of this testimony when the same person is prosecuted for an unrelated matter.

B. *Evaluating the Proposed Standards*

The discussion in Part III indicated that a stricter standard of protection for individuals' rights is appropriate in the immunity grant area than would be provided by either the present Fourth Amendment rule or even an adequate coerced confession rule. Both transactional immunity and the exclusionary rule proposed here provide such increased protection. After *Kastigar,* transactional immunity is not available as a minimum constitutional standard. A strict exclusionary rule still is. This factor alone suggests the value of this Note's proposed standards. In addition, however, a comparison of the transactional rule and the exclusionary rule proposed here, by the criteria established earlier,[73] suggests that the latter provides a superior balance between competing considerations.

With respect to the protection afforded the individual's privilege,

70. It could not be used as a source of new evidence because of standards 1 and 3.
71. Being caught in a lie could mean the end of a prosecutor's career. Conviction of a perjury charge might well result in disbarment.
72. *See* Ullmann v. United States, 350 U.S. 422, 439 (1956) (Black & Douglas, JJ., dissenting); Brown v. Walker, 161 U.S. 591, 610 (1896) (dissenting opinion).
73. *See* p. 179 *supra.*

the transactional rule and this Note's proposed rule are not significantly different, though in some circumstances the transactional rule may provide a slightly stronger safeguard against use of derived information in a manner short of introduction as evidence.[74] But as to the other consideration—cost to society—a more substantial difference exists. A transactional rule entirely forecloses prosecution of an individual for any matter as to which he has testified. The exclusionary rule proposed here, on the other hand, permits prosecution as long as the government can meet the objective criteria necessary to establish its evidence as untainted. As a consequence, it reduces considerably any interference with society's interest in prosecuting known wrongdoers.

Substantially higher costs to society should not be considered objectionable as long as they produce a significant, even though proportionately smaller, increase in protection for the individual's Fifth Amendment right. But penalizing society without corresponding gain for the individual cannot be justified. The transactional immunity rule, in comparison with this Note's rule, seems to do the latter. Although it significantly increases the cost to society, it provides only a marginal increase in protection for the individual's privilege.

V. Conclusion

The exclusionary rule proposed here would impose strict standards. It provides, however, no more than the Constitution requires—immunity "as broad as, but not harmfully and wastefully broader than, the privilege against self-incrimination."[75]

Kastigar's effect will be uncertain until the courts give content to the exclusionary rule that accompanies it. If the rule conforms with the standards suggested here, the holding may ultimately promote prosecution of known wrongdoers without sacrificing individuals' constitutional rights. If less stringent standards are adopted, however, the libertarians' lamentations will have been well justified.

74. The problem of tainted information does not arise with a transactional rule until a prosecution takes place for a matter as to which the accused has not been compelled to testify. Under the standards proposed here, on the other hand, some danger remains of such "secondary" use even in a prosecution for a matter as to which the defendant previously testified.

75. Murphy v. Waterfront Comm'n, 378 U.S. 52, 107 (1964) (White, J., concurring).